

³ The Board notes that, following the November 2, 2020 decision, OWCP received additional evidence and appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether OWCP abused its discretion in denying authorization for opioid medication for the period October 12 through December 10, 2020.

FACTUAL HISTORY

On November 4, 2013 appellant, then a 54-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained hip pain due to factors of her federal employment. She noted that she first became aware of her claimed condition on October 8, 2013 and realized of its relation to her federal employment on October 30, 2013. OWCP assigned the claim OWCP File No. xxxxxx224 and accepted it for resolved aggravation of arthropathy of the pelvic region and thigh.

On May 21, 2014 appellant filed another occupational disease claim (Form CA-2) alleging that she sustained severe pain in her hip that wrapped around her lower back due to factors of her federal employment. She noted that she first became aware of her condition on September 18, 2013 and realized its relation to her federal employment on May 14, 2014. OWCP assigned that claim OWCP File No. xxxxxx677 and accepted it for temporary aggravation of localized primary osteoarthritis of the left hip, resolved as of October 3, 2014.⁴ OWCP paid appellant wage-loss compensation on the supplemental rolls from May 24 through October 3, 2014.

On July 21, 2014 Dr. Ankur Chhadia, a Board-certified orthopedic surgeon and appellant's treating physician, requested authorization for left hip arthroplasty surgery.

On August 12, 2014 OWCP referred appellant for a second opinion. In a second opinion report dated October 7, 2014, Dr. Allan Brecher, a Board-certified orthopedic surgeon, diagnosed left hip arthritis. He opined that it was a temporary aggravation which had resolved. Dr. Brecher stated that appellant was eventually going to need a hip replacement, but that it was due to a preexisting problem not related to her work activities. He further opined that appellant was capable of returning to work performing her usual job duties.

On November 24, 2014 appellant filed claims for compensation (Form CA-7) for disability from work commencing October 3, 2014.

OWCP subsequently received an August 20, 2014 report, wherein Dr. Chhadia diagnosed left hip osteoarthritis and opined that it was a permanent aggravation due to overuse at work. Dr. Chhadia recommended that appellant proceed with left total hip arthroplasty.

By decision dated February 18, 2015, OWCP denied appellant's claim for compensation for total disability commencing October 3, 2014.

⁴ OWCP File Nos. xxxxxx677 and xxxxxx224 have been administratively combined, with the latter serving as the master file.

Appellant's treating physicians continued to request authorization from OWCP for left total hip arthroplasty.

On March 3, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's February 18, 2015 decision.

By decision dated October 20, 2015, the hearing representative set aside the February 18, 2015 decision, finding that there was an unresolved conflict of medical opinion between Drs. Chhadia and Brecher regarding whether appellant's accepted left hip aggravation was temporary or permanent, and whether appellant had continuing employment-related residuals or disability on or after October 3, 2014. It remanded the claim for an examination and a rationalized opinion by an impartial medical examiner (IME) regarding whether the accepted aggravation was temporary or permanent and whether appellant continued to be partially or totally disabled from work due to the employment-related aggravation on or after October 3, 2015. The hearing representative also directed that the IME explain whether the requested left hip replacement surgery was medically necessary due to the employment injury.

In a report dated January 28, 2016, Dr. Paul Belich, a Board-certified orthopedic surgeon serving as the IME, reviewed a statement of accepted facts (SOAF) and the medical record, and conducted a physical examination of appellant. He noted that appellant had previously fallen at work, but did not have left hip complaints until at least four months after the fall. Dr. Belich diagnosed osteoarthritis of the left hip and opined that it was not currently medically connected to the accepted work injury by direct cause or acceleration. He explained that, while aggravation of the preexisting left hip osteoarthritis had been accepted, it was temporary and continued disability after October 2014 would be attributed to her preexisting hip condition and was not work related. Dr. Belich recommended that she undergo a left hip total arthroplasty in order to treat the osteoarthritic condition and that, until she underwent the procedure, she should remain on limited duty. He further opined that because her current left hip complaints were not work related, if she was going to undergo the left hip arthroplasty, it should simply be performed without waiting for approval of payment of the procedure through OWCP, and that it should be paid for using her private insurance.

By decision dated April 13, 2016, OWCP denied medical authorization for left hip arthroplasty. It accorded the special weight of the medical evidence to the opinion of Dr. Belich.

On May 9, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated October 5, 2016, the hearing representative affirmed the April 13, 2016 decision.

On August 24, 2017 appellant requested reconsideration and submitted additional evidence. In a May 23, 2017 report, Dr. Eugene Lopez, a Board-certified orthopedic surgeon, opined that appellant's repetitive work-related duties contributed to her current left hip osteoarthritis and that her request for left total hip replacement needed to be revisited. He explained that appellant's work-related left hip osteoarthritis occurred due to repetitive motions and worsened when she fell on December 8, 2012 at work. In a report dated August 21, 2017, Dr. Lopez examined appellant and diagnosed work-related left hip osteoarthritis that was improving with conservative treatment. He recommended light-duty work restrictions.

By decision dated November 24, 2017, OWCP denied modification of the October 5, 2016 decision.

In a report dated June 5, 2018, Dr. Lopez explained that appellant's arthritis developed over time due to exacerbation involving wear and tear and inflammation as a result of carrying mail, bending, lifting heavy mail, squatting, walking, standing, pivoting, twisting, and turning. He noted that on December 8, 2012 appellant fell onto both of her knees and that she experienced pain in both knees. Appellant sought treatment with Dr. Lopez on March 4, 2013. She returned to Dr. Lopez on May 17, 2017 for a new injury to her left hip. Appellant informed Dr. Lopez that the onset of her symptoms was gradual, but that it began on October 8, 2013 while working as a mail handler. She stated that when she fell at work on December 8, 2012, her left hip was bothersome as well, but she did not pursue it because her knees were her primary concern. Appellant attributed aggravation of her left hip condition to duties of her federal employment. Dr. Lopez opined that appellant's job duties caused her left hip osteoarthritis, noting that the fall that occurred on December 8, 2012 more than likely exacerbated her left hip condition, but did not directly cause the arthritis. He again recommended left hip replacement.

In an Authorization Request form and Certification/Letter of Medical Necessity for Opioid Medications (Form CA-27) dated July 26, 2018, Dr. Lopez requested authorization for tramadol to treat appellant's left hip condition.

Dr. Lopez thereafter continued to request authorization for total left hip arthroplasty and continued to submit CA-27 forms requesting authorization for continued use of tramadol.

On January 18, 2019 OWCP noted that it had received a request from Dr. Lopez for left hip total arthroplasty, stating that the request was initially received and denied by decision dated April 13, 2016, affirmed by OWCP's Branch of Hearings and Review October 5, 2016, and that on November 24, 2017 the denial was upheld on reconsideration. It advised appellant to review the appeal rights included with its November 24, 2017 decision.

In a letter dated March 1, 2019, Dr. Lopez explained that appellant's left hip arthritis was exacerbated due to duties of her federal employment including lifting heavy mail, bending, squatting, standing, pivoting, twisting, and turning. He noted that on December 8, 2012 appellant fell on both her knees, which triggered the arthritis and again aggravated her symptoms. Dr. Lopez stated that the symptoms were always present, but that appellant did not file a claim in hopes that the symptoms would subside. He requested that OWCP approve appellant's request for authorization for surgery. On June 9, 2020 appellant requested reconsideration of OWCP's November 24, 2017 decision denying authorization for total left hip arthroplasty surgery.

By decision dated September 4, 2020, OWCP denied appellant's request for reconsideration, finding that the request was untimely filed and failed to demonstrate clear evidence of error.

OWCP authorized Dr. Lopez' requests for authorization of opioid medication through October 11, 2020.

In a Form CA-27 dated October 26, 2020, Dr. Lopez requested authorization for tramadol to treat appellant's hip condition for the period October 12 through December 10, 2020. He noted a date of last physical examination on October 26, 2020. In the portion of the form which requests a narrative letter of medical necessity, Dr. Lopez explained that appellant was being prescribed

tramadol on an as-needed basis for increased left hip pain while waiting for approval for surgery. He noted that it was necessary to keep the pain under control so that appellant could achieve everyday function at the lowest dose necessary to achieve this goal. Dr. Lopez noted no signs of somnolence or overmedication, addiction, withdrawal, or abuse and no “red flag” behavior such as excessive or early refills. He explained that a urine drug screen was not necessary at that time because appellant’s refills lasted much longer than the prescribed doses and because this was temporary on an as-needed basis for increased left hip pain.

By decision dated November 2, 2020, OWCP denied authorization for opioid medication for the period October 12 through December 10, 2020, finding that evidence was insufficient to establish that opioid medication was medically indicated for this period.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷

OWCP’s procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.⁸ Timeliness is determined by the document receipt date of the reconsideration request, *i.e.*, the received date in the Integrated Federal Employees Compensation System (iFECS). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.⁹

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of it in its most recent merit decision. The request must establish, on its face, that such decision was erroneous.¹⁰ The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should

⁵ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.a (September 2020).

⁹ *Id.* at Chapter 2.1602.4b (September 2020); *see also* *S.J.*, Docket No. 19-1864 (issued August 12, 2020); *W.A.*, Docket No. 17-0225 (issued May 16, 2017).

¹⁰ *W.A., id.; D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

deny the request by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error.

The most recent merit decision on the denial of authorization for left hip arthroplasty issue was dated November 24, 2017. As appellant's request for reconsideration was not received until June 9, 2020, more than one year after the November 24, 2017 decision, the Board finds that it was untimely filed.¹² Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying authorization for left hip arthroplasty.¹³

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP abused its discretion in denying authorization for left hip arthroplasty.

In support of appellant's request for reconsideration, OWCP received letters dated June 5, 2018 and March 1, 2019 from Dr. Lopez, in which he explained that appellant's left hip arthritis was exacerbated due to duties of her federal employment and requested that OWCP approve appellant's request for authorization for surgery. The Board notes that when a case is referred to an independent medical examiner for the purpose of resolving a conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴ In this case, Dr. Belich, serving as independent medical examiner, had previously opined on the issue of authorization for left hip arthroplasty on January 27, 2016, stating that her current left hip symptoms were not work related and that while he recommended left hip arthroplasty, it should be paid for using her private insurance. As the June 5, 2018 and March 1, 2019 letters from Dr. Lopez are insufficient to overcome the special weight of the medical evidence accorded to Dr. Belich, the evidence does not raise a substantial question as to the correctness of the denial of authorization for left hip arthroplasty. Thus, the Board finds that the evidence submitted on reconsideration does not demonstrate clear evidence of error on the part of OWCP in its November 24, 2017 decision.

As appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, the Board finds that OWCP properly denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

¹¹ *Supra* note 7 at Chapter 2.1602.5(a) (October 2011).

¹² *D.B.*, Docket No. 19-0648 (issued October 21, 2020); *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

¹³ *Supra* note 7.

¹⁴ *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

Section 8103(a) of FECA¹⁵ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of monthly compensation.¹⁶ While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.¹⁷

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.¹⁸ OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible, in the shortest amount of time. It, therefore, has broad administrative discretion in choosing means to achieve this goal.¹⁹

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.²⁰

FECA Bulletin No. 18-04, issued June 18, 2018, provided supplemental guidance on the management of cases and the authorization of opioid prescriptions where a claimant was receiving opioids for a work-related condition other than cancer. It indicated that it was instituting a new supplemental policy to address long-term and high dose opioid therapy. The Bulletin advised that for long-term and/or high dose users where the prescribed opioid therapy was deemed to require further management, completion of a letter of medical necessity would be required upon its request. Claims examiners were to review factors such as the claimant's morphine-equivalent dose, recent surgeries, and the cumulative continuous length of treatment in assessing the most appropriate action to take in each particular case.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP did not abuse its discretion in denying authorization for opioid medication for the period October 12 through December 10, 2020.

Dr. Lopez completed a Form CA-27 on October 26, 2020, requesting authorization for continued use of tramadol for the period October 12 through December 10, 2020 to treat appellant's hip condition. He noted a date of last physical examination on October 26, 2020.

¹⁵ *Supra* note 2.

¹⁶ 5 U.S.C. § 8103(a).

¹⁷ *J.M.*, Docket No. 20-0396 (issued April 9, 2020); *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

¹⁸ *J.M.*, Docket No. 20-0457 (issued July 16, 2020); *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

¹⁹ *P.L.*, Docket No. 18-0260 (issued April 14, 2020).

²⁰ *J.M.*, *supra* note 17; *C.S.*, Docket No. 19-0516 (issued August 15, 2019).

Under the portion of the form which requests a narrative letter of medical necessity, Dr. Lopez explained that appellant was being prescribed tramadol on an as-needed basis for increased left hip pain while waiting for approval for surgery. He noted that it was necessary to keep the pain under control so that appellant could achieve everyday function at the lowest dose necessary to achieve this goal. Dr. Lopez noted no signs of somnolence or overmedication, addiction, withdrawal, or abuse and no “red flag” behavior such as excessive or early refills. He explained that a urine drug screen was not necessary at that time because appellant’s refills lasted much longer than the prescribed doses and because appellant’s opioid prescription was temporary on an as-needed basis for increased left hip pain.

As noted, OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief, and the only limitation on OWCP’s authority is that of reasonableness. Dr. Lopez has not provided a sufficiently-rationalized explanation as to why prolonged continued opioid use was medically necessary, as he has not explained whether the current dose was the lowest effective dose and how he arrived at that conclusion; how and whether the current opioid dose had resulted in a demonstrated improvement in function; whether appellant had any comorbidities that would contraindicate continued opioid use at the current level; whether appellant was taking any other medications that could be harmful when combined with opioids.

As OWCP reasonably determined that Dr. Lopez’ opinion was insufficient, the Board finds that OWCP did not abuse its discretion.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly denied appellant’s request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error. The Board further finds that OWCP did not abuse its discretion in denying authorization for opioid medication for the period.

ORDER

IT IS HEREBY ORDERED THAT the September 4 and November 2, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 19, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board